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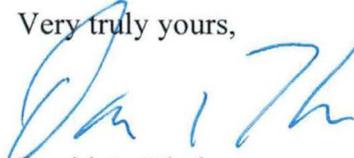
Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a) – Canadian National Railway Company (Docket No. FD 35743)*

Dear Ms. Brown:

Enclosed are the Highly Confidential version of the Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests, which is being submitted under seal in accordance with the Protective Order entered by the Board in this proceeding on December 16, 2013, as well as a Public version of that Motion, to be filed on the public record of this proceeding.

Very truly yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company and
Grand Trunk Western Railroad Company

cc: Linda J. Morgan, Esquire
William H. Herrmann, Esquire

PUBLIC VERSION

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
49 U.S.C. § 24308(a) – CANADIAN NATIONAL RAILWAY COMPANY

**THIRD MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD COMPANY
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

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AND GRAND TRUNK WESTERN RAILROAD COMPANY
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. § 1114.31(a), Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”) move for an order compelling National Railroad Passenger Corporation (“Amtrak”) to produce ridership and revenue database information pertaining to the passenger services Amtrak operates on CN’s lines (“Relevant Services”).

On September 22, 2014, Amtrak told the Board that its document production was complete. However, as CN explained to Amtrak that same day¹ and to the Board the next day,² Amtrak’s document production was far from complete. Among other deficiencies, Amtrak had neither described nor produced the ridership and revenue data contained in an Amtrak database that were relevant and responsive to CN’s October 2013 discovery requests. Its discovery responses were therefore incomplete, and it had failed to comply with the parties’ Joint

¹ See Ex. 1 (email from CN counsel to Amtrak counsel, Sept. 22, 2014).

² CN’s Resp. to Amtrak’s Reply to CN’s Mot. for Extension of Procedural Schedule 7-8 (filed Sept. 23, 2014).

Discovery Protocol, which requires each party to identify databases containing “non-duplicative relevant and responsive information” as a predicate to producing such information. Ex. 2, ¶ 3(e)(ii). On September 30, 2014, after a further reminder by CN, Amtrak at last produced a description of the relevant and responsive contents of its ridership and revenue database. Ex. 3. On October 6, CN confirmed which data should be produced. For weeks thereafter, Amtrak assured CN that it was reviewing what it would produce, and on November 11, Amtrak told CN to expect at least some production from Amtrak’s ridership and revenue database. But on November 19, Amtrak reversed its position and stated that it would not produce any portion of its ridership and revenue database.

Amtrak should be compelled to produce its ridership and revenue data pertaining to its services on CN’s lines. The data are relevant to this proceeding, and are also “non-duplicative” and “responsive” within the meaning of paragraph 3(e)(ii) of the Joint Discovery Protocol. Amtrak and the FRA have both argued that host railroad performance affects Amtrak’s ridership and revenues and that host railroad compensation, including contractual incentives and penalties, should take Amtrak’s ridership and revenues into account. In addition, the distribution of ridership and revenues by station is relevant to how on-time performance (“OTP”) should be measured for purposes of contractual incentives and penalties (*e.g.*, use of “all-stations” versus “endpoint” OTP). Moreover, the data CN seeks are held in already-identified fields in a readily accessible database used by Amtrak in the regular course of business, so their production would impose no significant burden.

Amtrak has raised two insufficient bases for refusing to produce the data. In September, Amtrak claimed that its existing production is adequate because it includes monthly summary reports with aggregate ridership and revenue data by service (*see, e.g.*, Ex. 4). *See* Ex. 5 (email

from Amtrak counsel to CN counsel, Sept. 22, 2014). But those summary reports omit a wealth of relevant data, including train-specific, station-specific, and segment-specific data that are in Amtrak's database. They provide no information about ridership and revenues specific to the segments of Amtrak services that CN hosts – information is provided for full services, even though CN hosts less than half the total length of the service for most of the Relevant Services – or about the distribution of ridership and revenue by station. With a more complete database available, Amtrak may not pick and choose the ridership and revenue data it produces. Nor may Amtrak substitute separate reports for the readily useable, fully integrated, and easily manipulated database it uses in its regular course of business.

Amtrak made a new argument on November 19 – that, in lieu of production now, it may later provide workpapers with respect to whatever ridership and revenue data it uses in its opening submission. Workpapers, however, would only provide information concerning the positions or evidence submitted by Amtrak. Here, CN seeks information about the value of the services it hosts in order to prepare CN's opening submission on incentives and penalties. CN's submission will be due before Amtrak produces workpapers, and CN is entitled to production relevant to its opening submission before it must be filed.

Consistent with the Joint Discovery Protocol, CN respectfully requests that this motion be handled on an expedited basis.³ With expedited handling, production of the requested ridership and revenue database information should cause no delay to this proceeding. Amtrak still has significant work to complete the production previously ordered by the Board,⁴ and

³ The parties agreed in their Joint Discovery Protocol that motions to compel should be handled on an expedited basis, with responses due in seven days. Ex. 2, ¶11.

⁴ The parties are in the process of settling upon appropriate custodians and search terms for identifying the further documents Amtrak is to produce related to delay coding pursuant to

production of the requested data should be simple and speedy. In any event, any delay would arise from Amtrak taking many months to describe its ridership and revenue database, and several more weeks to decide not to produce the data therein.

FACTUAL BACKGROUND

A. *This Proceeding: Issues, Discovery Requests and Responses, Discovery Protocol*

On July 30, 2013, Amtrak filed an application to initiate this proceeding. On October 24, 2013, both parties filed statements that identified performance payments (or “incentives”) and penalties as issues in this case. The value of performance is a factor in establishing incentives and penalties, so ridership and revenue data are relevant to the proceeding. Moreover, any system of incentives and penalties requires a measure of success or failure. As Amtrak’s measures adopted under PRIIA illustrate, potential measures include “endpoint” OTP, OTP at all stations, and OTP at selected stations. In comparing such options, ridership and revenue data for individual stations and segments are critical.

CN’s Document Requests (“RFPs”) 16 and 17, served on October 31, 2013, sought information about Amtrak’s ridership and passenger ticket revenue for the Relevant Services, expressly including data for “each station” and “particular segments”:

REQUEST FOR PRODUCTION NO. 16

Please produce all documents relating to the number of passengers loading and unloading on particular trains *at each station* on the Relevant Services, any analyses or projections of the number of passengers on particular trains of the Relevant Services and *between particular segments* of the Relevant Services and any analyses of ridership trends or factors affecting ridership on the Relevant Services.

the Board’s order of September 23, *Application of Nat’l R.R. Passenger Corp. Under 49 C.F.R. § 24308(a)*, Docket No. FD 35743 (STB served Sept. 23, 2014) (“September 23 Decision”). In addition, Amtrak has still not completed production of the relevant operating agreements ordered by the Board, or of email attachments Amtrak has admitted it erroneously omitted from its production.

REQUEST FOR PRODUCTION NO. 17

Please produce all documents relating to passenger ticket revenue generated by Amtrak on the Relevant Services, and *on each segment* thereof, including but not limited to any data, measurements, analyses, estimates, or projections of revenue on particular trains and *between particular segments* and any analyses of revenue trends or factors affecting revenue.

(Emphasis added.)

On November 19, 2013, Amtrak responded, raising boilerplate objections but stating that it would “produce any responsive, non-privileged documents . . . in a format mutually agreed upon by Amtrak and CN”:

RESPONSE TO REQUEST FOR PRODUCTION NO. 16

Amtrak objects to this Request for Production on the grounds that it is compound and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. Amtrak further objects to this Request for Production to the extent it seeks documents, analyses or projections that contain highly confidential and commercially sensitive information. Subject to and without waiving Amtrak's foregoing general and specific objections, *Amtrak will produce any responsive, non-privileged documents* at a time and place and *in a format mutually agreed upon by Amtrak and CN*.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17

Amtrak objects to this Request for Production on the grounds that it is overbroad and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. Amtrak further objects to this Request for Production to the extent it seeks documents that contain highly confidential and commercially sensitive information. Subject to and without waiving Amtrak's foregoing general and specific objections, *Amtrak will produce any responsive, non-privileged documents* at a time and place and *in a format mutually agreed upon by Amtrak and CN*.

(Emphasis added.)

In response to CN's Interrogatory 5, Amtrak also specifically identified its Enterprise Data Warehouse as a database “that may contain documents relevant to the issues in dispute.”

On January 30, 2014, the parties agreed in their Joint Discovery Protocol that:

The Parties shall identify any databases containing non-duplicative relevant and responsive information. If any such information exists, *the Parties shall confer to determine what data is contained in each database, and to agree upon the*

method and format for producing any such relevant and responsive information.

Ex. 2, ¶ 3(e)(ii) (emphasis added).

B. April to September: “We’ll Get Back to You”

On April 23, 2014, the parties’ counsel held a “meet and confer to discuss databases” pursuant to the Joint Discovery Protocol.⁵ Amtrak’s counsel advised CN’s counsel at the meeting that she needed to check on the availability and type of data regarding ridership and revenue and would get back to him promptly.

Over the next four months, CN’s counsel repeatedly reminded Amtrak’s counsel that CN was awaiting the promised information about Amtrak’s ridership and revenue database.⁶ On September 3, Amtrak’s counsel stated that “[w]e are still working through the other issues that you have raised [including the ridership and revenue database issue] and will follow up on those issues ... as soon as possible.”⁷ On a call two days later, Amtrak’s counsel reported that Amtrak was still working on several outstanding production issues, including the database questions.

⁵ See Ex. 6 (email from CN counsel to Amtrak counsel, March 31, 2014) (proposing meeting); Ex. 7 (email from Amtrak counsel to CN counsel, April 8, 2014) (agreeing to meeting).

⁶ See Ex. 8 (email from CN counsel to Amtrak counsel, June 4, 2014) (“I have not heard further from you on the [ridership and ticket revenue database] issue”); Ex. 9 (email from CN counsel to Amtrak counsel, July 31, 2014) (“Finally, a reminder that we have been waiting since late April for you [to] let us know about the availability and type of responsive information in Amtrak’s databases pertaining to ridership and ticket revenue.”); Ex. 10 (email from CN counsel to Amtrak counsel, Aug. 28, 2014) (“As a reminder, ... Amtrak has yet to provide ... the information we have been awaiting since late April concerning Amtrak’s ridership and revenue databases.”).

⁷ Ex. 11 (email from Amtrak counsel to CN counsel, Sept. 3, 2014).

C. *September 22-23: Amtrak's Partial Production and Inaccurate Self-Certification, CN's Objections, and the Board's Order*

On the afternoon of September 22, Amtrak made available to CN for download a set of documents designated as "ATK006." Amtrak's counsel characterized ATK006 as "Amtrak's final production" in response to CN's discovery requests. Regarding CN's still-outstanding request for ridership and revenue data, Amtrak's counsel stated that its "final" production included monthly "reports from [the Oracle database in Amtrak's Enterprise Data Warehouse] that are created and distributed to Amtrak personnel in the ordinary course of business."⁸

CN's counsel responded within an hour that "we do not agree that this can constitute Amtrak's final production." CN's counsel stated (among other objections) that Amtrak's "representation and production concerning [ridership and revenue] are hardly sufficient and do not comply with our prior agreements," and renewed CN's request for "information concerning the data in the database – so we can agree on the method and format for production of relevant, responsive information."⁹ Amtrak's counsel responded: "[w]e will review your comments and get back to you."¹⁰

The same afternoon, ignoring these and other deficiencies, Amtrak told the Board that its production was complete.¹¹ The next day, September 23, CN filed a response, identifying important respects (including missing ridership and revenue data) in which Amtrak's production was not complete,¹² and the Board issued its September 23 Decision, which (1) granted in part

⁸ Ex. 5 (email from Amtrak counsel to CN counsel, Sept. 22, 2014).

⁹ Ex. 1 (email from CN counsel to Amtrak counsel, Sept. 22, 2014).

¹⁰ Ex. 12 (email from Amtrak counsel to CN counsel, Sept. 22, 2014).

¹¹ Amtrak's Reply to CN's Mot. for Extension 3-4 (Sept. 22, 2014).

¹² CN's Resp. to Amtrak's Reply to CN's Mot. for Extension 6-8 (Sept. 23, 2014).

determine what data is contained in each database, and to agree upon the method and format for producing any such relevant and responsive information.

Ex. 2, ¶ 3(e)(ii).

Counsel discussed the ridership and revenue data, and other issues relating to Amtrak's production, at four successive conferences. On November 11, Amtrak's counsel reported that the matter was still in "active discussion" at Amtrak, and that Amtrak had not yet determined what production to make from the ridership and revenue database, but that counsel expected "there will be some production." CN's counsel advised Amtrak's counsel that CN would seek the Board's assistance unless Amtrak promptly agreed to produce the requested data. On November 19, Amtrak's counsel advised CN that, contrary to counsel's prediction, Amtrak would produce no further ridership and revenue data before the filing of opening submissions.

LEGAL STANDARDS

Parties to the Board's proceedings are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1);¹⁷ *Ballard Term. R.R. – Acquisition & Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731, slip op. at 3 (STB served Aug. 22, 2013) ("*Ballard*"). Relevance means only "that the information might be able to affect the outcome of a proceeding." September 23 Decision at 8 (quoting *Waterloo Ry. – Adverse Aban. – Lines of Bangor & Aroostook R.R. in Aroostook Cnty, Me.*, STB Docket No. AB-124 (Sub.-No. 2), slip op. at 2 (STB served Nov. 14, 2003) ("*Waterloo*"). It is not up to the opposing party to pick and choose the relevant information it will provide. Absent valid objections on other grounds, a

¹⁷ "It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2).

party is entitled in discovery to “all relevant and potentially admissible information ... not only the information that the [opposing party] believes is sufficient.” *Seminole Elec. Coop. Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009).

In considering motions to compel production, the Board considers whether the discovery sought would be unduly burdensome in relation to the value of the information sought. *See, e.g.*, September 23 Decision at 8 (“discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought”) (citing 49 C.F.R. § 1114.21(c)). Here, the value of the information sought is high and the burden of production (for identified data fields from an existing, easily accessed database) is slight.

ARGUMENT

I. The Data CN Seeks Are Relevant and Non-Duplicative

The ridership and revenue data sought by CN are relevant. The issues stated by both parties on October 24, 2013, include CN’s contractual incentives and penalties, and Amtrak ridership and revenues for the services and segments CN hosts are relevant to issues such as appropriate levels for incentives and penalties and their structure. This relationship has been recognized by FRA and Amtrak. A 2008 FRA report frequently cited by Amtrak argues that Amtrak would gain riders and revenues if OTP could be improved, which “raises the possibility of further incentivizing host railroads to support improved OTP.”¹⁸ Further, in negotiations with CN, Amtrak has suggested that incentives and penalties be structured around the value attributable to better or worse performance. That value relates in part to ridership and revenues.

¹⁸ Asst. Inspector Gen., Fed. R.R. Admin., *Effects of Amtrak’s Poor On-Time Performance*, FRA Rep. No. CR-2008-047, at 12 (March 28, 2008), available at https://www.oig.dot.gov/sites/default/files/effects_of_otp_report_FINAL.pdf.

Amtrak has not challenged the relevance of ridership and revenue data. Amtrak argues that it has met its duty of production by producing a summary monthly report of rudimentary ridership and revenue data aggregated by Amtrak service.¹⁹ But that production is inadequate in key respects. It excludes (1) the ridership and revenues “at each station,” “on each segment,” and “between particular segments,” requested in CN’s RFPs 16 and 17, (2) data specific to individual trains, and (3) data specific to the services run on CN’s lines as part of Amtrak services that run over multiple host railroads.

These are critical omissions, particularly in relation to incentives and penalties. They preclude CN from analyzing in terms of ridership or revenues the relative importance and value of endpoint-only measurement of OTP or delay, all-stations measurement, or measurement at a mix of key stations. The monthly reports would not even allow CN to determine the total ridership and revenues on CN’s lines for most of Amtrak’s services on CN (specifically, the Blue Water, the Lincoln, the Texas Eagle, and the Wolverine services), because the reports provide only aggregate data for each entire service, and CN hosts less than 50% of each of those services.

Yet, according to the information Amtrak provided on September 30, and as can be seen from various snippets of data found in Amtrak’s production to CN,²⁰ the ridership and revenue database Amtrak is withholding includes a wealth of granular data, including the data sought by specific segments and station pairs. *See* Ex. 3 (referencing, *e.g.*, “ **REDACTED**

”).²¹ Moreover, production of the database would be far more

¹⁹ *See* Ex. 5 (email from Amtrak counsel to CN counsel, Sept. 22, 2014). A copy of the most recent of these monthly reports, which are produced from Amtrak’s much richer database, is attached as Exhibit 4.

²⁰ *See, e.g.*, Ex. 16 (May FY10 Ridership Tkt Rev.pdf and Michigan Data 201307.xlsx).

²¹ Amtrak has informed CN that these tables, which Amtrak has also failed to produce,

valuable than rudimentary individual monthly tables drawn from it. The full data across the entire database can readily be searched, queried, and related to other data.²² CN should not be relegated to relying on an inadequate monthly report of Amtrak's choosing (or on other incomplete, scattered snippets of data), drawn from Amtrak's database, when the underlying database with complete information is readily available.

II. Amtrak Has No Other Valid Objections to Producing the Ridership and Revenue Data

Amtrak has offered no other valid basis for withholding the relevant non-duplicative data CN seeks from its database. As noted above, production would not be burdensome, and factual data on ridership and revenue should raise no privilege issues.

Confidentiality would also not be a valid ground of objection. Amtrak regularly provides selected ridership and revenue data to Congress and the public. (Because Amtrak is a federally subsidized enterprise, those data are a matter of public interest.)²³ And confidentiality concerns

can be derived from the broader ridership and revenue database sought by CN.

²² Because of such benefits, under Federal Rule of Civil Procedure 34(b), electronic data maintained in searchable form must generally be produced in that form. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitr. Litig.*, 2007 U.S. Dist. Lexis 2650, at *14 (E.D.N.Y. Jan. 12, 2007) (“data ordinarily kept in electronically searchable form ‘should not be produced in a form that removes or significantly degrades this feature.’”); *Jannx Med. Sys. v. Methodist Hosps., Inc.*, 2010 U.S. Dist. LEXIS 122574, at *11-12 (N.D. Ind. Nov. 17, 2010) (ordering plaintiff to produce responsive information “in an electronic database format that allows the information to be reasonably usable, *i.e.*, fully searchable and manipulable, with the connections between data fields intact.”). Moreover, the parties’ Joint Discovery Protocol provides that “relevant and responsive” database information should be identified and produced, and “[t]he Party from whom native files are requested shall not unreasonably deny a request to produce the native files.” Ex. 2, ¶¶ 3(e)(ii) and 3(h); *cf. id.* ¶ 3(e)(i) (providing that spreadsheets “shall be produced in native format”).

²³ In a press release last month, Amtrak published aggregate annual ridership and revenue data in a form similar to its monthly summary reports, and relied on those data in expressing a need to enforce its “contractual rights” to reduce delays on lines hosted by freight railroads, which it claimed led to “lower ridership and revenue.”

<http://www.amtrak.com/ccurl/238/481/Amtrak-FY2014-Ridership-and-Revenue-ATK-14->

should in any event be addressed under the Board’s protective order, not by withholding data. *See* Decision served Apr. 15, 2014, at 7 (granting in part CN’s first motion to compel) (“Nor is it necessary or appropriate to [redact] on grounds of commercial sensitivity. The protective order jointly proposed by the parties and adopted in this case does not provide for such redactions from documents produced under a ‘Highly Confidential’ designation; to the contrary, the Highly Confidential designation itself, under the Board’s protective order, provides sufficient protection.”).²⁴

Finally, as discussed above, compelling CN’s requested production by Amtrak need not delay this proceeding. *See* pp.3-4 & n.4, *supra*. And, in any event, if any delay does occur, it would solely be a consequence of Amtrak’s failure to respond in a timely and reasonable manner to CN’s requests. Amtrak should not be rewarded for these failures, nor should CN be denied its right to discovery.

III. Amtrak’s Post-Filing Workpapers Cannot Substitute for Amtrak’s Required Pre-Filing Production of Ridership and Revenue Data

At the parties’ November 19, 2014, discovery conference, Amtrak’s counsel suggested that if CN’s need for ridership and revenue data is tied to Amtrak’s potential use of those data in

[096%20.pdf](#). CN and the Board should have the opportunity to test such claims, and their applicability to CN’s lines, against Amtrak’s data.

²⁴ *Accord, e.g., Ill. Railnet, Inc. – Acquisition & Operation Exemption – BNSF Ry.*, STB Finance Docket No. 34549, slip op. at 2 (STB served Apr. 15, 2005) (ordering party that produced a document with confidentiality-based redactions to produce it in unredacted form); *Wisc. Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42051, slip op. at 3 (STB served June 21, 2000) (affirming ALJ order granting subpoena at request of party arguing that “the Board routinely permits discovery of [sensitive and confidential] materials subject to a protective order”); *Grain Land Coop v. Can. Pac. Ltd.*, STB Docket No. 41687, slip op. at 3-4 (STB served Dec. 1, 1997) (reversing ALJ order that permitted redaction; “[e]ven in situations where rail carriers object to a complainant’s access to unredacted material due to its extraordinary commercial sensitivity, we have found that protective orders provide adequate safeguards from unauthorized or unintended disclosure.”).

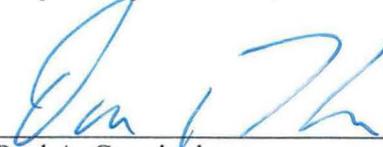
support of Amtrak's position, CN should await whatever workpapers Amtrak provides with its opening submission. As CN counsel explained in response, Amtrak's premise is wrong. Like Amtrak, CN needs to address incentives and penalties in its opening submissions, and CN is entitled to relevant and responsive data to inform its own initial proposals now.

Amtrak's counsel suggested an analogy between CN's request for Amtrak's ridership and revenue data and certain Amtrak document requests to CN, but the analogy is inapt. In response to a number of burdensome and premature Amtrak requests for documents related to CN "claim[s]," CN stated appropriate objections and noted that it will produce workpapers as and when it determines what "claims" it will make. (Amtrak did not contest those responses.) By contrast, CN's request for ridership and revenue data is not directed at Amtrak claims and is not burdensome. CN seeks data, in the form in which Amtrak maintains them in the regular course of business, to inform and support CN's own claims.

CONCLUSION

CN respectfully requests that the Board consider this motion on an expedited basis and compel Amtrak to produce, in native format, the complete ridership and revenue fields of its database identified by Amtrak in Exhibit 3 hereto, for the services it runs (in whole or in part) on CN's lines, within the agreed-upon discovery date range (May 1, 2011, to October 31, 2013). Amtrak's discovery should not be considered complete, and the 30 days for opening submissions under the Board's schedule should not begin to run, until Amtrak has done so and fully met its other discovery obligations.

Respectfully submitted,



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*Counsel for Illinois Central Railroad Company
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December 2, 2014

EXHIBIT 1

From: David A. Hirsh/Harkins Cunningham/US
To: "Rollins, Graham" <grollins@morganlewis.com>, lmorgan@nossaman.com
Cc: "nkling@harkinscunningham.com" <nkling@harkinscunningham.com>
Date: 09/22/2014 04:17 PM
Subject: Re: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Graham and Linda,

Thank you for your email. We look forward to receiving this further production.

Based on even a cursory review of your email, however, we do not agree that this can constitute Amtrak's final production.

After waiting five months for information on Amtrak's ridership and ticketing revenue databases, your representation and production concerning it are hardly sufficient and do not comply with our prior agreements. You are to provide information concerning the data in the database -- so we can agree on the method and format for production of relevant, responsive information. Amtrak came unprepared to our meet and confer on the subject last April. We presented detailed information on the fields and layouts of our own databases at that time and we expect the same from Amtrak so we may determine the data we want and its format. Please provide this detailed information as soon as possible so we may proceed.

I will review the issue further, but I am also greatly concerned with your representation that you have removed elements of the family documents you have provided. Documents you deem not relevant may provide critical context for documents you agree are relevant, and it is no answer to ask us to guess where and when that is or laboriously to review the production based on traces of other documents to look for such instances. I do not believe this represents typical or best practices, but as noted, I will review the issue with my team.

David

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35743

APPLICATION OF THE
NATIONAL RAILROAD PASSENGER CORPORATION
UNDER 49 U.S.C. § 24308(a)
— CANADIAN NATIONAL RAILWAY COMPANY

JOINT DISCOVERY PROTOCOL

The following Joint Discovery Protocol (“Protocol”), dated this 30th day of January 2014, shall apply to all documents, including but not limited to electronically stored information and other electronically stored discovery materials (hereinafter “ESI”), maintained and/or exchanged by the Parties (“Parties” or “Party”) in this proceeding, and to certain other issues relating to discovery in this proceeding. The obligations in this Protocol are in addition to those set forth in the Protective Order entered by Surface Transportation Board (“Board”) on December 16, 2013. The purpose of this Protocol is to facilitate the conduct of discovery and the resolution of disputes. Compliance with this Protocol may be considered by the Board in resolving discovery disputes.

1. **Searches for Responsive Documents.** In response to a request for document production, a Party shall search both the paper files and the reasonably accessible ESI of custodians who are reasonably likely to possess responsive documents that are not duplicative of documents that would be possessed by other custodians already being searched. In order to search such reasonably accessible ESI, each Party shall apply the relevant time frame and search terms reasonably necessary to satisfy all non-objectionable parts of document production requests. Each Party shall produce on a rolling basis non-privileged, relevant, and responsive

documents and information, including ESI, in the format provided for under Paragraph 3 and within a time frame agreed by the Parties or otherwise ordered by the Board.

(a) Search Dates and Methodology.

(i) The Parties have agreed that the starting date for selection of responsive documents will be May 1, 2011 (encompassing documents created, revised, sent, in force, in effect, or in operation from that date forward), with the exception of: (1) documents relating to actual and potential capital expenditures and investments in rail lines and infrastructure/capacity funding issues with respect to rail lines; and (2) documents relating to general discussions or analyses of public policy issues or PRIIA metrics. The ending date for selection of responsive documents will be October 31, 2013 (the date of the first document request in this proceeding).

(ii) The use of search terms appears to be reasonably necessary to identify emails and email attachments, and may be reasonably necessary to identify other ESI, likely to contain discoverable information. Prior to document production, the Parties shall exchange search terms and try to reach agreement on them, but agreement shall not be a precondition to searching for and producing documents. The Parties shall fully document their use of search terms, including which search terms are used for which custodians and for which ESI sources. If a Party discovers that the search terms it is using are failing to collect non-privileged documents that are within the non-objectionable scope of document requests, it shall broaden its search to the extent reasonably necessary to collect such documents.

(b) Custodians. Prior to document production, the Parties shall exchange initial lists of custodians whose files they propose to search, including the custodian's title, the date the custodian assumed the position, and the names of any persons within the company who,

at any time after May 1, 2011, had prior responsibility for one or more of the custodian's present responsibilities respecting an area or subject of the other party's discovery requests. The Parties shall supplement and update their list of custodians as their search and production progresses.

(c) Disputes. Either before or after production, the Parties after conferring may seek resolution at the Board of any remaining disputes regarding search terms, custodians, or other discovery issues. Each party agrees to promptly raise concerns with the producing party concerning its list of search terms or list of custodians.

2. **ESI Not Reasonably Accessible.** ESI may not be reasonably accessible where the requirements in order to search that ESI involve undue burden and costs. For purposes of this Protocol, ESI available from a live, readily accessible source shall be considered "reasonably accessible." ESI maintained on voicemail systems and mobile phones, and ESI which cannot be retrieved without great effort and cost, including ESI maintained on obsolete or "legacy" systems no longer in use, or on backup tapes and other archival media, shall be considered "not reasonably accessible." Neither Party shall have an affirmative obligation to investigate whether ESI that is not reasonably accessible contains potentially responsive and non-duplicative information.

(a) Each Party shall provide the opposing Party with a list and description of any ESI that a Party considers not reasonably accessible, setting forth (i) a description of the nature of the ESI (*e.g.*, email communications, account payable information, etc.); (ii) the type of media in which the not reasonably accessible data is contained, to the extent it is known or can reasonably be ascertained; and (iii) the reasons the ESI is considered not reasonably accessible. If, after conferring, the Parties are unable to resolve their disagreement as to whether the ESI is

or is not reasonably accessible, the Party contesting the designation of the ESI as not reasonably accessible may seek resolution of that issue from the Board.

(b) Each Party shall promptly notify the other Party if it learns of responsive, non-privileged documents that are not duplicative of documents already being produced that are contained in ESI that is not reasonably accessible. Upon such notification, the Parties shall promptly meet and confer to determine what steps, if any, should be taken with respect to such not reasonably accessible ESI. If, after conferring, the parties are unable to agree on what steps should be taken with respect to such ESI, then the Party seeking the search and production of such ESI may seek resolution from the Board.

3. **Production.** Unless the Parties agree otherwise, the provisions set forth in this Section shall govern the format for the production of all documents. To the extent that issues arise in the course of productions that are not fully addressed in this Protocol, the parties shall immediately confer to resolve them. In all instances, the producing Party shall make all reasonable efforts to insure that documents are produced in a manner that is easily reviewable and not inconsistent with modern e-discovery techniques.

(a) Bates Numbering and Confidentiality Designations. Each Tagged Image File Format (“TIFF”) image of a produced document (see Subsection 3(b), below) shall contain a legible Bates number that: (i) is unique across the document production; (ii) has a constant length across the production; and (iii) is sequential within a given document. Each page shall be numbered such that it can be uniquely identified and will include before the Bates number an acronym identifying the producing Party (*e.g.*, “CN” or “ATK”) followed by the zero-filled sequential number (*e.g.*, CN0000000987 or ATK0000019931). Rather than skipping Bates numbers within the range of production, the Parties shall use placeholders (marked “No

Document For This Bates Number”). In addition, a producing Party designating a document for confidential treatment shall place the appropriate confidentiality designation – “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” – on each TIFF image of that document. Both the Bates number and confidentiality designation shall be placed on the page image in a manner that does not conceal or interfere with any information contained on the page. The producing Party shall not place any stamp or information on a document it produces that is not on the original, other than the Bates number, any confidentiality designation, or an indication of any redactions. The provisions of this Subsection 3(a) notwithstanding, Bates numbering and the confidentiality designations of documents produced in native format shall be in accordance with Subsections 3(b) and 3(i).

(b) Format for Production.

(i) Except for ESI produced in native format, the Parties shall electronically produce any non-privileged, relevant, and responsive document in electronic format as a single-page black and white Group IV TIFF image with a minimum resolution of 300 dpi. Receiving Parties shall have the right to request that a document be produced in color if they have a reasonable basis to believe that color will significantly improve their understanding of the document, and such a request shall not be unreasonably denied.

(ii) For each document produced, the Parties shall provide a document level or multipage text file containing Optical Character Recognition (“OCR”) text (for documents without extractable text) or extracted text (where available). Each such text file shall be named to correspond with the beginning Bates number of the produced document from which the text was obtained. All text files shall be provided in separate folder titled “Text.” For each produced document, the Concordance .DAT file (or similar load file if provided in another

format) shall contain a field named "OCR PATH," which shall be populated with the path to the corresponding OCR/Extracted text file.

(iii) The producing Party shall also provide both a metadata load file and an image load file. Those load files shall be produced in Concordance format (.DAT file using Concordance standard delimiters for the metadata load files, and .OPT file using Concordance standard fields for the image load files). The producing Party shall also provide image load files in a format viewable in or readily convertible to the IPRO Image Viewer, with extracted text files at the document level having the same file name as its corresponding image file, unless a document has otherwise been redacted. The image load file shall provide image and document break information for the TIFF files produced that correspond to the beginning Bates numbers contained in the metadata load file. Every TIFF file in each production must be referenced in the production's corresponding image load file, and the total number of TIFF files referenced in a production's image load file shall match the number of TIFF files in the production. The metadata load file for each production shall provide the Bates numbers and the Bates number attachment range for email or other documents containing attachments and any applicable confidentiality designation.

(iv) The producing Party shall also provide a multipage searchable OCR text file for the unredacted portions of each redacted document as well as for the entirety of each document that does not contain redactions. The OCR text files and image load files should indicate page breaks, to the extent possible.

(v) Paper documents shall be imaged and produced in digital form, including an OCR file and a TIFF file for each document. When scanning paper documents, distinct documents shall not be merged into a single record, and single documents shall not be

split into multiple records. The Parties shall use physical bindings as document boundaries, such that the smallest binding shall be the document, and the largest binding shall be the attachment group.

(vi) In order to minimize any delays that may arise from conflicts or incompatibilities between the software used by each Party, the parties shall exchange sample image load files, metadata load files, OCR text files, and TIFF files within seven (7) calendar days of the date of this Protocol, which shall be representative of the principal file formats in which the Parties expect to produce documents.

(c) Metadata.

(i) ESI. During the process of converting ESI from the electronic format of the application in which the ESI is normally created, viewed and/or modified to TIFF, metadata values shall be extracted and produced in a metadata load file, unless one or more of the metadata fields would reveal information that has otherwise properly been redacted, in which case that specific information may be redacted from the pertinent metadata field. To the extent they are available in collected data, the metadata values that are to be extracted and produced in the metadata load files are:

1. BEGBATES
 - (a) Starting production number
2. ENDBATES
 - (a) Ending production number
3. BEGATTACH
 - (a) Starting production number of attachment range
4. ENDATTACH
 - (a) Ending production number of attachment range
5. CUSTODIAN
 - (a) Name of individual custodian. Where not reasonably available, identify company custodian (e.g., "CN" or "ATK")
6. ATTACHMENT COUNT
 - (a) Number of attachments
7. ATTACHMENT NAMES
 - (a) Names of attachments, delimited by ";"
8. MD5 HASH
9. ELECTRONIC DOCUMENT TYPE/FILE EXTENSION

10. FILE SIZE
11. FILE NAME
12. FILE LOCATION
13. NATIVE FILE PATH
14. DATE SENT/CREATED
15. TIME SENT/CREATED
16. DATE LAST MODIFIED
17. TIME LAST MODIFIED
18. FROM/AUTHOR(S)
19. TO
20. CC
21. BCC
22. SUBJECT
 - (a) Subject line of email
23. COMMENTS
 - (a) Any comments recorded in document properties (not internal comments within the document)
24. IMPORTANCE FLAG
 - (a) Marked as YES if an email was sent with high importance
 - (b) Marked as NO if not

(ii) Attachments. In addition, for every document that includes an attachment, to the extent available, the following fields should be produced and populated as part of the metadata load file record for both parents and attachments to provide the parent/child or parent/sibling relationship:

- 1) BEGBATES
 - a) Starting production number
- 2) ENDBATES
 - a) Ending production number
- 3) BEGATTACH
 - a) Starting production number of attachment range
- 4) ENDATTACH
 - a) Ending production number of attachment range

(iii) Paper Documents. With respect to images of paper files, the producing Party shall provide in the metadata load file information corresponding to items 1-5 in the list in subparagraph (i) above and information relating to attachments in accordance with subparagraph (ii) above.

(d) Logical Unitization for Images. The producing Party shall make reasonable efforts to split image-based electronic files (scanned PDFs and multi-page TIFFs) into logical files (known in the information technology industry as logical unitization).

(e) Spreadsheets and Database Data.

(i) Spreadsheets are defined as MS-Excel and other application programs whose primary function is the organization, display and processing of data in a row/column format. Each spreadsheet shall be produced in native format unless the spreadsheet is to be redacted and redacting the spreadsheet in native format would be unduly burdensome as compared to redaction not using native format. The producing Party shall retain for the duration of this proceeding (including any appeals, judicial review and or proceedings on remand) unredacted originals of any spreadsheets that are produced with information redacted. When producing redacted spreadsheets in other than their native formats, the producing Party shall legibly display all unredacted data including all hidden rows, columns, cells, worksheets, comments, formulas, and metadata, as well as any associated headers or footers.

(ii) The Parties shall identify any databases containing non-duplicative relevant and responsive information. If any such information exists, the Parties shall confer to determine what data is contained in each database, and to agree upon the method and format for producing any such relevant and responsive information. The Parties shall also confer with respect to the most reasonable form of production for any other data contained in any other format that cannot reasonably be produced and understood in single-page TIFF format or where the review of native data by the receiving Party would require the use of a proprietary or non-standard file viewer or media player.

(iii) If after conferring the Parties are unable to resolve a production issue discussed in this Subsection 3(e), the Party seeking production may seek resolution of that issue from the Board.

(f) Media Files. Media files shall be produced in the native media file format in which they were maintained in the ordinary course of business, unless redactions are needed. If redactions are needed, the redacted media file may be produced in either the original native format or a standard media format.

(g) System and Program Files. System and program files defined as such in the National Software Reference Library need not be processed, reviewed, or produced. Additional files may be added to the list of excluded files by mutual agreement of the Parties.

(h) Native File Production. Any file produced in its native format shall be assigned a single Bates number and shall be named with its Bates number and producing Party acronym, and shall be assigned any applicable confidentiality designation, following the format conventions of Subsection 3(a). The load file entry for any file produced in native format shall include a field containing the file's original file name and a link to the produced file. For every file produced in native format there shall be a single TIFF image containing the words "File Produced in Native Format," the name of the file as produced, and the corresponding Bates number and any confidentiality designation for the file. The Parties reserve the right to request production of additional ESI in native format after review of data produced as TIFF images rather than in native format. The Party from whom native files are requested shall not unreasonably deny a request to produce the native files if the other Party has shown a particularized and substantial need for such information. Should the Parties not reach agreement after conferring, the requesting Party may file with the Board a motion to compel the production of such ESI in native format.

(i) Physical Production of Documents. The Parties shall produce all documents in electronic format to the requesting Party on CD, DVD, flash drive, via secure ftp,

or hard drive, as appropriate for the size of the production. Multiple small media (*e.g.*, several CDs) shall not be provided where one larger medium (*e.g.*, a DVD) can reasonably be produced.

(j) Redactions. If the producing Party redacts a document, such redaction shall be clearly marked on the TIFF image of the document. For each redacted document, the producing party shall also either (i) provide a list identifying by Bates number those pages that have been redacted or that contain redactions and the reason(s) for such redactions or (ii) a database field populated with an indicator of redaction and the reason(s) for redaction. A failure to redact information shall be subject to the provisions of Section 10.

(k) De-duplication. A Party is only required to produce a single copy of any responsive document. A Party may de-duplicate ESI across each Party's custodians or sources, but is not required to do so. A Party may only de-duplicate "exact duplicate" documents as identified by MD5 hash and not de-duplicate "near duplicate" documents. Hard copy documents may not be eliminated as duplicates of responsive ESI if the hard copy document contains any distinguishing writings, markings, or other features not evident from an otherwise duplicate version of the document.

4. **Costs**. The costs of discovery, including ESI, shall be borne by each respective Party. However, the Board may, upon application by a Party, consider apportioning the costs of discovery where appropriate and upon a showing of good cause.

5. **Applicable Provisions**. Except as otherwise expressly addressed in this Protocol, each Party's discovery and ESI production obligations shall be subject to the obligations, limitations, and protections contained in the Board's rules governing discovery, 49 C.F.R. Part 1114, Subpart B, and in the Protective Order entered by the Board on December 16, 2013.

6. **Expert Materials**. The Parties agree not to seek discovery of any experts' notes, drafts of expert reports or communications with counsel, unless that expert had involvement with

the factual issues in this proceeding (outside that expert's role in preparing to advise or testify) and such materials are otherwise discoverable. However, counsel may inquire at any expert's deposition about any facts provided to the expert by counsel and upon which the expert is relying in formulating the expert's opinions.

7. **Meet and Confer.** The Parties shall meet and confer to agree upon the timing for beginning and completing the rolling production of relevant and responsive documents and information.

8. **Confidential Documents.** Documents that contain Confidential Information (as defined in the Protective Order) shall be handled according to the procedures set forth in that Order. If a Party converts native files or other ESI designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under the Protective Order to hard copy form, it shall mark the hard copy with the appropriate designation.

9. **No Privilege Logs, Absent Order.** Except as the Board may provide by specific order in this proceeding, no privilege logs shall be required in this proceeding, and the failure to provide a privilege log shall not be relied upon in any way in support of any claim of waiver of attorney client privilege or of attorney work product protection. The Parties reserve the right, however, to challenge before the Board any claims of privilege or work product protection.

10. **Handling of Privileged Documents.**

(a) Each Party shall make reasonable efforts to identify and withhold from production all information that it claims to be privileged or subject to work product protection. If information subject to a claim of attorney-client privilege or work product protection or otherwise immune from discovery is inadvertently or mistakenly disclosed or produced by a Party (such information hereinafter referred to as "Inadvertently Disclosed Information"), such disclosure or production shall in no way constitute a waiver or forfeiture of, or estoppel as to, any claim of privilege or work product protection or immunity for such information and its subject matter.

(b) If a Party intends to produce a document marked as privileged or as subject to work product protection, the producing Party shall so notify the receiving Party, identifying the document by Bates number, at the time of production. Subparagraphs (c) and (d) below shall not apply to such documents. In the event that a receiving Party discovers that a producing Party has produced a document that is marked as privileged or otherwise bears indicia of attorney-client privilege or work product protection the receiving Party shall promptly cease reading the document and so notify the producing Party through its counsel, specifically identifying such document by its Bates number. The producing Party shall promptly respond to any such notification, stating whether it claims attorney-client privilege or work product protection with respect to the document. If the producing Party states that it makes such a claim, the document shall be treated as Inadvertently Disclosed Information in accordance with subparagraph (e) below. If the producing Party does not state within seven (7) days that it makes such a claim, any such claim with respect to that document shall be deemed waived, and the receiving Party shall be free to retain and resume reading and otherwise use the document, subject to such confidentiality restrictions as may apply.

(c) No receiving Party shall assert that the fact that it has been permitted to review or receive Inadvertently Disclosed Information constitutes a waiver of any right, privilege, or other protection that the producing Party had or may have had. In thereafter seeking production of the Inadvertently Disclosed Information, the receiving Party shall not assert waiver or estoppel as a ground for such production. Nor shall the producing Party use the Inadvertently Disclosed Information as a basis for arguing for disqualification of counsel for the receiving Party.

(d) If the producing Party asserts that Inadvertently Disclosed Information was privileged or otherwise protected from discovery, the receiving Party shall destroy all copies of, and any electronic records, notes or memoranda that reflect the substance of, such Inadvertently Disclosed Information within ten (10) business days of such request, except that portions of backup tapes may instead be destroyed in accordance with standard retention

policies. The receiving Party shall promptly provide a certification of counsel that all such Inadvertently Disclosed Information has been destroyed. If Inadvertently Disclosed Information to be destroyed was not produced to the receiving party in a format permitting destruction of the Inadvertently Disclosed Information without also destroying other documents or data that have been produced, then the producing party shall provide a replacement set for such other documents or data and the receiving party need not destroy the Inadvertently Disclosed Information until that replacement set has been received. The producing Party will maintain copies of all Inadvertently Disclosed Information until the later of (1) 60 days following its request to the receiving Party for the destruction or return of the Inadvertently Disclosed Information, or (2) the resolution by the Board of any and all challenges to the producing Party's assertions of privilege regarding such Inadvertently Disclosed Information that are brought within those 60 days.

11. **Motions.** The Parties agree that all discovery-related motions in this proceeding should be determined on an expedited basis. To that end, unless otherwise agreed to by the Parties or ordered by the Board, replies to discovery-related motions shall be due within seven (7) days of the filing and service of the motion.

Read and approved by:

1/30/14
Date:

Linda J. Morgan

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EXHIBIT 3

REDACTED

EXHIBIT 4

REDACTED

EXHIBIT 5

From: "Rollins, Graham" <grollins@morganlewis.com>
To: "dirsh@harkinscunningham.com" <dirsh@harkinscunningham.com>
Cc: "Morgan, Linda J." <lmorgan@nossaman.com>, "nkling@harkinscunningham.com" <nkling@harkinscunningham.com>
Date: 09/22/2014 03:27 PM
Subject: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Good afternoon David,

I am transmitting Amtrak's production ATK006 to Neill King via electronic transfer. This is Amtrak's final production in response to CN's requests for production. It contains 49,322 documents. In addition, I am sending Neill a revised copy of ATK005 with a slipsheet in place of document ATK0000032723 per your email of September 9th. Lastly, we are providing supplemental information to Amtrak's response to CN's Request for Admission #4.

Production Issues

With respect to the issues you have raised in previous correspondence re: Amtrak's productions:

1. Ridership and Ticketing Revenue Data

Amtrak maintains and uses an enterprise data warehouse built on an Oracle database that stores ridership and ticketing revenue data. In Amtrak's production ATK006, Amtrak has produced reports from this database that are created and distributed to Amtrak personnel in the ordinary course of business. These reports are generated monthly, and one is included for each month from April 2011 to October 2013. I will send you a list of Bates numbers that identify these reports. Amtrak believes these reports provide the information CN seeks regarding ridership and ticketing revenue requests for production 16 and 17 with respect to data contained in Amtrak's data warehouse.

2. Incomplete Document Families

Amtrak's document production includes emails where one or more documents attached to that email have not been produced. Amtrak has withheld those documents from production because they are not responsive to CN's document requests. I have attached a report that lists the documents that have one or more attachments withheld as non-relevant from Amtrak's production ATK005. I will send a further report for ATK006. If you have any questions or concerns about specific documents on this log, please let us know.

3. Word Documents with Mismatched Text

The documents you identified with mismatched text contain Track Changes information. The differences between the extracted text and the information visible on the TIFF image of the document are the result of this Track Changes metadata. The text is not incorrect or mismatched and, in fact, provides more information than is visible on the TIFF. Amtrak does not intend to reproduce prior productions as the versions produced are usable and do not contain incorrect information. However, we have made changes to our process for ATK006 to accommodate your request that the TIFF images and searchable text match by re-OCR'ing the TIFF images. ATK006 and any future productions will reflect this change, which is consistent with CN's productions to date.

Response to Request for Admission #4

CN's Request for Admission #4 is reproduced here for reference:

Admit Amtrak has increased the number of trains it operates on IC's and GTW's lines from 8 trains per day on IC and none on GTW in 1971, to 16 trains per day on IC and 8 trains per day on GTW at present.

We responded with:

Amtrak objects to this RFA on the grounds it's compound. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak admits that the number of trains operated on GTW's lines increased from none in 1971 to 8 trains per day at

present. Except as expressly admitted herein, Amtrak denies RFA #4.

A revised response with additional information is below:

Amtrak objects to this RFA on the grounds it's compound. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak admits that the number of trains operated on GTW's lines increased from none in 1971 to 8 trains per day at present. Amtrak further admits that the number of trains operated on IC's lines increased from 12 trains per day in 1971 (not 8 trains per day as stated in the request) to 16 trains per day at present. Except as expressly admitted herein, Amtrak denies RFA #4.

Please let me know if you have any issues with the production sets for ATK006 or the revised ATK005. Please also send confirmation that you have deleted all copies of ATK0000032723.

Regards,

Graham Rollins

Morgan, Lewis & Bockius LLP

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EXHIBIT 6

From: David A. Hirsh/Harkins Cunningham/US
To: "Morgan, Linda J." <lmorgan@nossaman.com>
Date: 03/31/2014 04:01 PM
Subject: Re: Discovery Requests/Response to February 27th Letter

Linda:

This email (A) responds to your email below concerning the meet and confer issues discussed in my December 27, 2013 letter (to which I urged you to respond in my February 27, 2014 letter), (B) provides comments on the search terms you forwarded separately on March 6, and (C) provides minor revisions we've determined are required to the CN search terms that I sent you on March 14.

(A) With respect to the issues identified by us as part of the meet and confer process, the following bear further comment at this time:

RFP 7: We ask Amtrak to reconsider its refusal to produce information relating to its own hosting of passenger rail service, particularly if in response to CN's pending motion to compel with respect to RFP 6 the Board orders Amtrak to produce information relating to its own hosting.

RFP 8-10: As you note, we offered to accept the limitations in Amtrak's responses to RFP 9 and 10 if Amtrak agrees to produce voluntarily the documents responsive to RFP 8 relating to other host railroads. RFP 8 seeks documents relating to actual or potential capital expenditures or contributions to capital expenditures to improve, facilitate, or reduce costs associated with Amtrak service on host railroads. Rather than agree to our offer, you state that you are "willing to further discuss with Amtrak the production of documents regarding actual capital expenditures in RFP 8," but that you would not agree "to provide documents pertaining to 'potential' capital expenditures," because you believe the request is overbroad and calls for speculation.

We cannot accept a limitation that excludes all documents pertaining to potential capital expenditures. Such a limitation would exclude Amtrak's consideration of capital investments that CN has specifically proposed for Amtrak services over CN's lines, and it would be inconsistent with Amtrak's own request to CN for documents relating to capital investments "considered to increase or decrease delays to passenger or freight trains." *See* Amtrak RFP 34. CN, however, would be willing to compromise by limiting the scope of Amtrak's response to RFP 8 consistent with the scope of CN's response to RFP 34, that is, to documents that "propose, analyze, approve, or disapprove" of potential capital investments.

Please let me know by April 7 if this is acceptable to Amtrak. If not, this may be the subject of a further motion to compel. In the mean time, unless Amtrak agrees to expand its response, it should expect CN to similarly limit its responses to Amtrak requests concerning capital investments.

RFP 13: Amtrak agreed in its discovery response to produce “organizational charts” in response to RFP 13, so this request was not the subject of our meet and confer exchange. In your March 6 email forwarding Amtrak’s search terms you state that your custodial list “is responsive” to RFP 13. That list, however, is not an organizational chart and is not a substitute for an organizational chart as it fails to show the organizational structure of Amtrak’s employees. Please provide Amtrak’s organizational charts without further delay.

RFP 14 and Interrogatory 20: Your email states that Amtrak is still considering the issues relating to the scope of its response to RFP 14 and Interrogatory 20. Amtrak has had more than sufficient time – almost three months now – to consider these responses. Please let us know Amtrak’s final position by April 7 so that we can promptly determine whether to file a motion to compel.

RFP 18: As discussed below with respect to Amtrak search term #1, we believe the search terms intended to identify information concerning the pricing of passenger tickets and the relationship between ticket prices and ridership are too narrow and should be expanded as indicated.

RFP 20: You state that you are still unclear as to what CN is seeking, but that you will “see what documents turn up.” As we previously clarified in my December 27, 2013 letter, we are seeking through RFP 20 documents relating to claims, analyses reviewed by Amtrak or submitted by Amtrak, or projections or quantifications of benefits to the public of Amtrak service, and also documents relating to any actual, projected, or claimed relationship between such public benefits and Amtrak’s on-time performance. Amtrak and others have made claims concerning the public benefits of its services (e.g., passenger time savings, environmental benefits, cost savings), as well as the relationship of Amtrak on-time performance to such benefits.

You say that you will “see what documents turn up,” but none of your searches appears calculated to find such documents. Accordingly, we suggest below an additional search term (#5) that should do so.

Interrogatory 17: The issues you raise with respect to this interrogatory appear to relate exclusively to Part (b), which asks for documents related to complaints, grievances, criticisms, assessments and alike of Amtrak’s “promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains.” Your response raises two essential issues, one with respect to “implementation,” and the other with respect to limiting your answer to CN-specific documents. I respond in order:

(i) **Implementation:** You claim – for the first time -- that Interrogatory 17’s request for production regarding criticisms and assessments of Amtrak’s “implementation” of policies, practices, and procedures is “overbroad,” and you offer to “discuss” any specific implementation documents CN seeks.

We believe this request is important and not overbroad. Much of what Amtrak has done regarding the areas covered by Part (b) of Interrogatory 17 falls into the category of implementation rather than promulgation. Implementation includes the ways in which Amtrak has in practice interpreted or applied its various policies, practices, or established procedures, as distinct from the initial process of developing and adopting them. In particular, the way in which Amtrak has implemented delay coding is of central relevance to this proceeding insofar as such delay coding may be proposed as a basis for an incentive or penalty provision. It is neither requisite nor practicable for CN to identify the specific responsive documents in Amtrak's possession. As a guide, however, we are particularly interested in documents relating to criticisms and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes, (ii) Amtrak's internal processes for and inconsistencies in reviewing coding issues, and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (*e.g.*, imposing time limits on carriers seeking to identify coding errors).

With this further clarification, our hope is that Amtrak will withdraw any objection regarding the production of documents relating to criticisms or assessments of its "implementation" of its various policies. Please let us know by April 7 so that we may promptly determine whether to file a motion to compel.

(ii) Limitation to "CN-Specific Documents": As CN made clear during our meet and confer and again through my letter of December 27, 2013, it is not reasonable for Amtrak to limit its response to Part (b) of Interrogatory 17 to "CN-specific documents." All of Amtrak's policies of general applicability to host carriers by definition apply to and are relevant to CN, but, because they are of general applicability, those policies will not necessarily refer specifically to CN. Thus, many of the documents covered by Part (b) of Interrogatory 17 are apt to be excluded by Amtrak's limitation of its production to "CN-specific documents," even though the policies, practices, and procedures at issue apply to CN.

In addition, Amtrak's limitation would disable CN from understanding (i) issues that may not have directly affected CN to date but may affect CN in the future, (ii) how widespread issues and criticisms have been with respect to Amtrak policies and procedures, and (iii) the extent to which Amtrak has or has not been consistent in developing and applying policies and procedures to various host railroads.

Amtrak's agreement to produce "relevant business records" that cover certain "policies, practices and procedures" is inadequate. It would seem to exclude most or all documents regarding implementation and, in fact, seems unlikely to add anything substantial to the set of CN-specific documents that Amtrak has already agreed to produce.

Please let me know by April 7 if you agree with respect to your response to Part (b) of Interrogatory 17 to remove your limitation to documents that specifically refer to CN, so that we may determine whether to file a motion to compel.

Interrogatory 18: As we've discussed, and consistent with the requirements of our Joint Discovery Protocol (see Section 3(e)(ii)), we need to meet and confer regarding databases. Your production of a copy of the Delay Data Recording Policy, however, need not and should not be deferred since it is a discrete policy relating to Amtrak's instructions to its conductors and not technical database issues. Please produce it ASAP.

We are amenable to discussing at our database meeting the other database-related answers that you told us in December you would provide, but, given the procedural schedule, such a meeting must take place promptly. I suggest later this week. Please let me know if that is acceptable and suggest dates and times.

(B) As outlined below, Amtrak's search terms are deficient in important respects.

General comments

(a) In accordance with our comments above, Amtrak's search terms are generally deficient in that they are designed to limit production to CN-specific materials, thereby excluding a wide range of relevant, discoverable material sought by CN. There are many ways in which Amtrak could modify or supplement its search terms to remedy this deficiency. Our comments on specific searches (and accompanying redline) below do not attempt to address that issue. Instead, they address other, more specific issues.

(b) In providing our comments, we assume that Amtrak intends to produce all non-privileged responsive documents with respect to certain requests through means other than use of search terms, as no search terms appear to apply to such requests (*e.g.*, RFP 4 (number of trains on CN lines), RFP 13 (org charts), IR 4 (records mgmt and retention policies)). Please confirm that this is your intention, and identify the CN requests to which Amtrak intends to respond without relying on search terms.

Searches #1, #2, and #3

- "IC" and "ICRR" should be added before the AND connector as these are common abbreviations for Illinois Central Railroad; indeed, in our experience, more common abbreviations than "ICR"
- "CNRR" should similarly be added as another form of abbreviation for Canadian National Railway Company
- Wildcards (*i.e.*, *) should be added after Illini and before Saluki (in order to pick up documents that contain the term "Illini/Saluki" or Illini-Saluki")
- Wildcards should be added before and after each train ID, (*e.g.*, *364*) (in order to pick up documents that refer to the trains using CN's naming convention, which include P364 or P36491-05)

Search #1

- Common synonyms for "delay," such as late, held, hold, wait, meet, stop, or slow should be added to the parenthetical "(delay and freight)"

- The term “ridership” should be changed to “rider*” in order to identify any documents that use the term rider(s)
- The word “ticket” should be struck from “ticket revenue” because “ticket revenue” would not find responsive documents that use terms such as “revenues from tickets or ticketing” or “fare box revenues” or “ridership revenues” etc.
- Common synonyms for coding (“classif*” and “categor*”) should replace “Cod*” in the parenthetical “(Cod* w/5 delay)” (“cod*” is already separately covered by the search terms)
- The following common synonyms and acronyms should be added to the end of the existing search string in order to identify documents responsive to various CN requests: price* OR pricing OR rate OR relief OR performance OR payment OR FTI OR (freight W/5 interfer*) OR offset OR lookback OR look-back OR “look back” OR DAI OR dispatch* OR priority OR preference

Search #2

- Common synonyms for infrastructure investment and funding terms, such as capex OR cap-ex OR facil* OR plant OR invest* should be added after the AND connector

Search #3

- “OR fund” should be added to the end of the search string

Search #4

- The term “207” should be moved to the left side of the AND connector
- The following string should be added before the AND connector in order to identify documents responsive to various CN document requests: “improvement act” OR ((15 OR fifteen) W/10 miles)
- The following string should be added after the AND connector in order to identify documents that may use common synonyms for other words used in this search string: standard* OR measure OR criteri* OR HRD OR delay OR cost* OR burden* OR interfer*

Suggested additional search term #5:

We believe the following fifth search should be added in order to identify documents responsive to RFP 20 that are unlikely to be identified through the previous searches:

(Amtrak OR Amtk OR “National Railroad Passenger Corporation” OR NRPC OR “on time performance” OR “on-time performance” OR OTP OR late OR delay OR FTI OR interfer*) AND (public w/5 benefit)

Suggested additional search term #6:

We believe the following sixth search should be added in order to identify responsive documents that are unlikely to be identified through the previous searches:

(polic* or proced* or practice* or rule*) AND CDR OR HRD OR OTP OR FTI OR (host w/3 responsib*) OR “freight train interference” OR (on*time w/3 perform*)

As noted above, attached is a redline showing our specific suggestions to Amtrak’s search terms. Please let me know by April 7 whether Amtrak agrees to implement these important changes.

(C) Minor revisions to CN’s search terms

In order to work properly with our consultant’s review engine, we have determined that some minor changes are required to our initial list of search terms. Attached is a redline that shows those changes. In addition, the redline adds Czarny and Urena to search #5, a change I noted for you in my email of March 24, and adds them and Jim Vena to the custodian key.

Thanks,

David



Amtrak search terms - redline 3-31-14.docx

Final IC-GTW Search Terms (rev 03-31).docx

EXHIBIT 7

From: "Morgan, Linda J." <lmorgan@nossaman.com>
To: "'dhirsh@harkinscunningham.com'" <dhirsh@harkinscunningham.com>
Date: Tue, Apr 8, 2014 11:10 PM
Subject: Discovery Follow Up

David,

Following up on your March 31 email:

1. Amtrak Search Terms: Your suggested changes are under serious consideration, and I will have a revised draft to you as soon as possible. Regarding document production independent of search term searches, we will be providing documents in response to RFP 4 (number of trains), RFP 13 (organizational charts) and IR 4 (records management and retention policies). I will get back to you if we identify any additional responses in this category.
2. RFP 13: We will be producing the organizational charts that exist.
3. RFP 18 and 20: We are considering your requests in the context of the search term revisions.
4. Interrogatory 18: We will be producing Amtrak's Delay Data Recording Policy as a business record in accordance with our response. Regarding a meet and confer to discuss databases, perhaps we can talk by phone tomorrow afternoon or sometime Thursday.
5. Regarding RFP 7, 8-10, and 14 and Interrogatory 17 and 20, I am not in a position to agree to any change in Amtrak's responses at this time.

Linda

EXHIBIT 8

From: David A. Hirsh/Harkins Cunningham/US
To: lmorgan@nossaman.com
Date: 06/04/2014 05:14 PM
Subject: Amtrak/CN - Discovery and Schedule Issues

Linda,

The present schedule calls for us to complete discovery by June 13, which is a week from Friday. Given outstanding discovery matters, it seems likely that an extension of that deadline will be necessary.

(1) On April 23, we met to discuss production from our respective databases.

(a) For Amtrak's production to CN, we discussed production of data regarding ridership and ticket revenue. You stated you needed to check on the availability and type of responsive data and said you would get back to me promptly. I have not heard further from you on the issue.

(b) With respect to data collected in CN's SRS database, I explained that CN is willing to provide information covering the full time period within our discovery range (5/1/11 to 10/31/13), and include information not just for the CN lines on which Amtrak operates, but full data for every subdivision that Amtrak runs on, even when Amtrak runs over only a portion of the subdivision. As I noted, this would effectively cover most of CN's U.S. network. Further, I provided you with data dictionaries (essentially a list and description of data fields) for the available information (Highly Confidential Bates #s CN0000007688-94), and noted that we can produce the data in Comma Separated Value (CSV) form, which readily converts to Excel. Based on this information, you were to let me know the scope, dates, data fields and form for any of this database information that Amtrak wants. Again, I have heard nothing back from you on this. As I stated at the meeting, depending on the volume of information Amtrak might request, it could easily require two weeks to produce the information.

(c) Finally, I asked you to let me know if there was a particular date you want to specify (within our discovery date range, of course) for us to provide the TSPs (schedules) then in effect. So far, you have not specified a date. Please provide one so we can proceed with our production of the TSPs.

(2) With respect to ongoing production, in its May 9, 2013 Reply in Opposition to the Second Motion to Compel Amtrak stated (at page 3) that it is "in the process of providing hundreds of thousands of documents." With the deadline for discovery approaching, however, we have so far received only 660 documents. Given our agreement to produce documents on a rolling basis, this suggests that Amtrak has a significant way to go before it completes discovery. Likewise, although we expect to produce more documents next week, we will still have a significant volume of additional documents for review and production.

(3) In addition to the above, CN's appeal of the Director's denial of our first motion to compel is pending, as is our second motion to compel. Even if these pending matters are decided prior to next Friday, if the Board orders Amtrak to produce additional documents or information, it will presumably require some time for Amtrak to do so.

In light of the above, I suggest we set a time tomorrow or Friday to discuss the schedule with a view to requesting an extension, as appropriate, this upcoming Friday or Monday. Please let me know if that would work for you or if you have other thoughts on the schedule.

Thanks,

David

EXHIBIT 9



**Re: Replacement Disc With Inadvertently Produced Privileged Documents
Removed**

David A. Hirsh to: Morgan, Linda J.

07/31/2014 04:10 PM

Cc: "grollins@morganlewis.com", "Blair, Stephanie A."

Linda,

A few follow up items on discovery.

(1) We received the replacement disc. It appears to contain the metadata showing confidentiality designation that we discussed exchanging for our past production (and including with future productions). I had been waiting for confirmation that you were ready to exchange same, now that you've provided it, attached is our CSV file with the confidentiality designations.



CN_Productions_ConfDesignations.csv

(2) Also with respect to the replacement disc that we received, if a similar situation should arise in the future, please remember to insert place holders for missing Bates numbers as per Protocol Sec. 3(a). We are not asking, however, that you replace the replacement.

(3) For future deliveries of media (discs, drives, etc.) related Amtrak electronic productions, please deliver them to my partner Neill Kling in our Philadelphia office, copying me on any accompanying communication. The address is as follows:

Neill C. Kling, Esq.
4000 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103-7044

(4) Finally, a reminder that we have been waiting since late April for you let us know about the availability and type of responsive information in Amtrak's databases pertaining to ridership and ticket revenue.

David

David A. Hirsh
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
dhirsh@harkinscunningham.com

Direct: 202.973.7606

"Morgan, Linda J." David, As follow up to the email exchan... 07/29/2014 02:41:49 PM

From: "Morgan, Linda J." <lmorgan@nossaman.com>
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>
Cc: "Blair, Stephanie A." <sblair@morganlewis.com>, "grollins@morganlewis.com" <grollins@morganlewis.com>
Date: 07/29/2014 02:41 PM

Subject: Replacement Disc With Inadvertently Produced Privileged Documents Removed

David,

As follow up to the email exchanges included in the attached pdf, Amtrak is sending you a replacement disc with the inadvertently produced privileged documents removed. I am copying Tess Blair and Graham Rollins from Morgan, Lewis & Bockius. Amtrak has retained Morgan Lewis to assist with discovery in this matter. The revised production disc will come directly from them. You should contact them directly with any questions or concerns about the production, copying me on any related correspondence. Thanks.

Linda [attachment "0164_001.pdf" deleted by David A. Hirsh/Harkins Cunningham/US]

EXHIBIT 10

From: David A. Hirsh/Harkins Cunningham/US
To: "Morgan, Linda J." <lmorgan@nossaman.com>
Cc: grollins@morganlewis.com
Date: 08/28/2014 06:42 PM
Subject: Re: Our Recent Conversation

Linda,

Thanks for the update. Please let me know when you're ready to talk about the schedule.

As you know, we were supposed to complete discovery yesterday. Obviously that did not happen as neither of us completed our initial document production and we are still awaiting the Board's decision on two outstanding motions to compel. For our part, we expect to complete our production early next week, most likely Tuesday.

As a reminder, in addition to completing Amtrak's initial production, Amtrak has yet to provide the missing operating agreement referenced in my August 22 email or the information we have been awaiting since late April concerning Amtrak's ridership and revenue databases.

In our last call, I also mentioned that we have found some apparent problems with Amtrak's recent production. You asked me to identify the problems as soon as possible. Accordingly, although our review continues, I want to raise two issues that we have identified to date:

(1) Missing Attachments

We have identified so far at least 100 instances in which attachments referenced in the metadata and in the text of a document are missing from the production. Examples include:

- ATK0000024809 and ATK0000024830 (no Begin Attach or End Attach Bates numbers despite the metadata giving names to attachments and the e-mails themselves referencing attachments)
- Document 303-09OCT12-CHI-STL.tif (identified as the attachment to ATK0000024809) does not exist independently in the database

We have also identified several instances in which some but not all of the identified attachments were produced. Examples include:

- ATK0000027335 (email attaching 2 files, but only 1 attachment in the production)
- ATK0000027363 (email attaching 2 files, but only 1 attachment in the production)
- ATK0000031343 (email attaching 16 files, but only 14 attachments in the production)

Please have your document vendor check your production, identify all such incomplete files, and send us replacement files that include all attachments for production.

(2) Missing Text

We have noticed (without any exhaustive search) several instances in which the image version of a document is missing content that appears in the text (or html) version of the document. Examples include ATK0000029674 and ATK0000029677. Please look into this discrepancy generally within your production and provide images or native versions of the documents with complete text.

Also, if possible, we ask that you be sure these issues do not recur in your future production(s).

Thanks,

David

David A. Hirsh
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
dhirsh@harkinscunningham.com

Direct: 202.973.7606

EXHIBIT 11

From: "Morgan, Linda J." <lmorgan@nossaman.com>
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>
Date: 09/03/2014 04:32 PM
Subject: Schedule and Discovery Issues

David,

Following up on my call, I wanted to let you know that Amtrak is not agreeable to an extension of the procedural schedule at this time. Regarding outstanding discovery issues, Amtrak will not be producing the Hudson Line Agreement as you have requested. This agreement is not an operating agreement with another host railroad. We are still working through the other issues that you have raised and will follow up on those issues and with Amtrak's next production as soon as possible.

Linda

Linda J. Morgan
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EXHIBIT 12

From: "Rollins, Graham" <grollins@morganlewis.com>
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>, "lmorgan@nossaman.com" <lmorgan@nossaman.com>
Cc: "nkling@harkinscunningham.com" <nkling@harkinscunningham.com>
Date: 09/22/2014 05:25 PM
Subject: RE: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Good afternoon David,

Thank you for your emails below. We will review your comments and get back to you. We will also review any examples you send.

In the meantime, per my email, here is the list of documents that contain the monthly Ridership and Ticket Revenue reports generated from the enterprise data warehouse.

Month	Bates Number
April 2011	ATK0000071363
May 2011	ATK0000071395
June 2011	ATK0000071396
July 2011	ATK0000070412
August 2011	ATK0000141270
September 2011	ATK0000073831
October 2011	ATK0000071388
November 2011	ATK0000071389
December 2011	ATK0000141262
January 2012	ATK0000155475
February 2012	ATK0000073388
March 2012	ATK0000067213
April 2012	ATK0000067486
May 2012	ATK0000069237
June 2012	ATK0000069795
July 2012	ATK0000067593
August 2012	ATK0000178470
September 2012	ATK0000072633
October 2012	ATK0000086142
November 2012	ATK0000069196
December 2012	ATK0000155475
January 2013	ATK0000034981
February 2013	ATK0000069384
March 2013	ATK0000175161
April 2013	ATK0000037100
May 2013	ATK0000067313
June 2013	ATK0000055582
July 2013	ATK0000126740
August 2013	ATK0000048255
September 2013	ATK0000067857
October 2013	ATK0000154731

Regards,

Graham Rollins

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW | Washington DC 20004
Direct: 202.739.5865 | Main: 202.739.3000 | Fax: 202.739.3001
grollins@morganlewis.com | www.morganlewis.com

From: dhirsh@harkinscunningham.com [mailto:dhirsh@harkinscunningham.com]
Sent: Monday, September 22, 2014 4:50 PM
To: Rollins, Graham; lmorgan@nossaman.com
Cc: nkling@harkinscunningham.com
Subject: Fw: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Graham and Linda,

On the incomplete family issue below, note also that some of the documents we observed missing even from Amtrak's relatively small prior productions appear clearly relevant as involving delays or ridership and revenues. Therefore, your explanation below would not seem to cover such missing documents. We will provide you with some examples, most likely tomorrow.

David

----- Forwarded by David A. Hirsh/Harkins Cunningham/US on 09/22/2014 04:46 PM -----

From: David A. Hirsh/Harkins Cunningham/US
To: "Rollins, Graham" <grollins@morganlewis.com>, lmorgan@nossaman.com
Cc: "nkling@harkinscunningham.com" <nkling@harkinscunningham.com>
Date: 09/22/2014 04:17 PM
Subject: Re: Amtrak/CN - Amtrak's Production ATK006 and Revised ATK005

Graham and Linda,

Thank you for your email. We look forward to receiving this further production.

Based on even a cursory review of your email, however, we do not agree that this can constitute Amtrak's final production.

After waiting five months for information on Amtrak's ridership and ticketing revenue databases, your representation and production concerning it are hardly sufficient and do not comply with our prior agreements. You are to provide information concerning the data in the database -- so we can agree on the method and format for production of relevant, responsive information. Amtrak came unprepared to our meet and confer on the subject last April. We presented detailed information on the fields and layouts of our own databases at that time and we expect the same from Amtrak so we may determine the data we want and its format. Please provide this detailed information as soon as possible so we may proceed.

I will review the issue further, but I am also greatly concerned with your representation that you have removed elements of the family documents you have provided. Documents you deem not relevant may provide critical context for documents you agree are relevant, and it is no answer to ask us to guess where and when that is or laboriously to review the production based on traces of other documents to look for such instances. I do not believe this represents typical or best practices, but as noted, I will review the issue with my team.

David

EXHIBIT 13

HARKINS CUNNINGHAM LLP

Attorneys at Law

David A. Hirsh
202.973.7606
dhirsh@harkinscunningham.com

1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
Telephone 202.973.7600
Facsimile 202.973.7610

September 25, 2014

By E-mail

Graham Rollins, Esquire
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Linda J. Morgan, Esquire
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, D.C. 20006

**Re: *Application of the National Railroad Passenger Corporation under
49 U.S.C. § 24308(a) – Canadian National Railway Company (Docket
No. FD 35743)***

Dear Graham and Linda:

As per the Board's order served September 23, 2014, please let us know when you would like to meet and confer on custodians in connection with CN's Request for Production No. 14 and Interrogatory No. 17.

As discussed briefly in our email exchange following Amtrak's production of ATK006 this week, there are two other significant remaining issues with respect to Amtrak's production that the Board has not addressed and we would like to resolve promptly.¹

1. Failure to Produce Attachments to Responsive Emails

As stated in my September 22 email of 4:17 pm, we are concerned that you have selectively removed attachments to admittedly relevant documents produced in response to CN's discovery requests. The lists that we received from Graham on Tuesday indicate that Amtrak has withheld on relevance or confidentiality grounds approximately 3000 email attachments (158 attachments to responsive emails in ATK005, plus 2819 attachments to responsive emails in ATK006).

¹ If, as we hope, we can amicably resolve the two issues discussed below, CN will drop its request that Amtrak replace earlier produced image files with image files that match the text files Amtrak has produced.

HARKINS CUNNINGHAM LLP

Attorneys at Law

Graham Rollins, Esquire
Linda J. Morgan, Esquire
September 25, 2014
Page 2

We believe that this selective withholding is improper, and that (as CN has done) all attachments to relevant and responsive emails should be produced, without regard to whether the attachment might be deemed relevant if, contrary to reality, it were on its own. The Board has already ruled in this proceeding that Amtrak cannot redact documents because Amtrak deems part of the document irrelevant or non-responsive, or because Amtrak deems them highly confidential or competitively sensitive. *See* Board Order of April 15, 2014, at 6-7 (“It would be inappropriate to permit Amtrak preemptively to redact portions of the responsive agreements on relevance grounds without affording outside counsel and consultants for CN the opportunity to review the redacted material. Nor is it necessary or appropriate to do so on grounds of commercial sensitivity.”). The Board made that ruling with respect to compound documents – “Amtrak’s operating agreements with host railroads, including amendments, attachments, exhibits, and schedules,” *id.* at 6. And it reiterated again this week that Amtrak must produce in full “all [relevant] agreements . . . (including any amendments, exhibits, attachments or schedules thereto).” Board Order of September 23, 2014, at 9.

This same principle that the Board has applied to a compound document that is an agreement plus attachments is equally applicable to the compound document that is an email plus attachments.² In each case, the attachment provides context and meaning to the main document.³ Moreover, emails should be produced as they are kept in the “usual course of business,” Fed. R. Civ. P. 34(b)(i) – *i.e.*, with their attachments attached.⁴ Precedent and practice confirm this: attachments to relevant and

² The Joint Discovery Protocol treats emails as compound documents that “include” their attachments. *See* Joint Discovery Protocol ¶ 3(c)(ii) (“In addition, for every document that **includes** an attachment, to the extent available, the following fields should be produced and populated as part of the metadata load file record for both parents and attachments to provide the parent/child or parent/sibling relationship.” (emphasis added)). *See also* Morgan Lewis & Bockius LLP, *e-Data 2012* at 187 (defining “Electronic-Mail Message (Email)” as “A document created or received via an electronic-mail system, **including** brief notes, formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, that may be transmitted with the message” (emphasis added)), available at http://www.morganlewis.com/pubs/morganlewis_edatadeskbook2012.pdf.

³ *See, e.g., PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 U.S. Dist. Lexis 66767, *33 (N.D.N.Y. Sept. 7, 2007) (“Attachments to emails are important and useful”) (requiring that all produced emails be re-produced with all their attachments attached, rather than separated). Attachments will frequently provide more valuable context than metadata, which, consistent with normal practice, the Joint Discovery Protocol requires to be provided for **all** documents – not just those for which the producing party deems the metadata relevant. *See* Joint Discovery Protocol ¶ 3(c).

⁴ *See, e.g., PSEG*, 2007 U.S. Dist. Lexis 66767, at *36 (“Without question, attachments should have been produced with their corresponding emails as such are kept in the usual course of business.”).

HARKINS CUNNINGHAM LLP

Attorneys at Law

Graham Rollins, Esquire
Linda J. Morgan, Esquire
September 25, 2014
Page 3

responsive emails should be produced in full, without regard to whether the attachment would be deemed independently relevant and responsive if viewed in isolation.⁵

The circumstances of this case illustrate why this principle is important, and why it also makes sound practical sense to produce attachments to relevant emails, without taking more time to produce less data by picking and choosing among them. In my second email on September 22 (at 4:50 pm), I offered to provide some examples of attachments withheld from ATK005 that appear likely to be independently relevant and responsive to CN document requests. The following list provides a few illustrations of what appears to be a much larger problem:

- ATK0000024839 - Names of Missing Attachments: CDR Issue Log for Karin.xls; Karin Audit List.xls; Email Subject Line: RE: CN Segments
- ATK0000027274 - Name of Missing Attachment: CN.xls; Email Subject Line: Fw: CN Response
- ATK0000027307 - Name of Missing Attachment: CN Chgo-Joliet FTI Feb - May 18 2012.ppt; Email Subject Line: RE: UD Tower
- ATK0000027318 - Names of Missing Attachments: HostRRDelayDump_CN_KAC.csv; Delay Code Description.pdf; Email Subject Line: RE: CN screens for IHB
- ATK0000029443 - Name of Missing Attachment: CN Chgo-Carbondale FTI Analysis 20110509.ppt; Email Subject Line: CN Delay Analysis Revised
- ATK0000030261 - Name of Missing Attachment: CN Recovery.xls; Email Subject Line: RE: PTH dwell

Based on their titles and contexts, it appears likely that, even applying the wrong test of whether the attachment is independently relevant, these attachments are relevant and responsive. We do not know that for sure, of course, because we do not have access to the content of the

⁵ See, e.g., *Flame S.A. v. Indus. Carriers, Inc.*, 2014 U.S. Dist. Lexis 109954, *31-32 (E.D. Va. Aug. 8, 2014) (“to the extent responsive emails originally included attachments, those attachments should have been produced, absent some privilege”; imposing sanctions for failure to do so); *Skepnek v. Roper & Twardowsky, LLC*, 2014 U.S. Dist. Lexis 11894, *4-5 (D. Kan. Jan. 27, 2014) (granting a motion to “compel defendants to produce all attachments to e-mails that defendants have already produced” because “[d]efendants do not have the leisure of picking and choosing what responsive documents to produce.”); *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 675 n.14 (M.D. Fla. 2008) (“The dubious practice of producing emails without attachments in federal discovery has not gone unnoticed by the courts.”) (citation omitted).

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attachments. But that fact only confirms the wisdom of the principle that email attachments should be produced without regard to whether they are independently relevant. It will be much more efficient for Amtrak to produce the 3000 attachments, which it has apparently already identified and located, than it would be for CN to guess from their titles and contexts which attachments either have independent relevance or provide useful context to related relevant emails and other attachments.⁶

We therefore ask that you promptly produce all of the attachments you have withheld. Please let us know by September 30 whether you agree to produce these missing attachments.

2. Failure to Provide Necessary Information about Amtrak's Ridership and Ticketing Revenue Databases

In accordance with paragraph 3(e)(ii) of the Joint Discovery Protocol, the parties agreed to exchange information about relevant databases, expressly including Amtrak's ridership and ticketing revenue databases, last April. As noted in my September 22 email of 4:17 pm and documented in CN's September 23 filing (see page 8 and Attachment 2), CN provided detailed information concerning the fields and layout of its databases at the April 23, 2014 meet-and-confer, which was scheduled specifically for the purpose of exchanging this information as agreed by the parties in their discovery protocol. Amtrak did not provide its database information then, and has still not provided it.

This information is necessary to enable us to determine what ridership and revenue data to extract from Amtrak's enterprise data warehouse and what format for extraction will be used. Amtrak's proffer of monthly reports is not an acceptable substitute, for two reasons: (1) it would prevent us from understanding the data that Amtrak collects and that is available for use beyond what Amtrak has unilaterally chosen to provide; and (2) it would leave CN with a collection of isolated, static monthly reports rather than a data set drawn from a database that CN can format and manipulate for various queries.

Graham indicated in his September 22 email of 5:25 pm that you would get back to me on the issues raised in my emails to you about this and other concerns with Amtrak's sixth production. We await that response. I reiterate my request of September 22 that Amtrak provide this information as soon as possible.

* * * * *

⁶ See *PSEG*, 2007 U.S. Dist. Lexis 66767, at *25 (rejecting the producing party's suggestion that the requesting party should be put to the burden of identifying "relevant" attachments, since doing so would "prolong the discovery period" and would compromise the requesting party's work product protection).

HARKINS CUNNINGHAM LLP

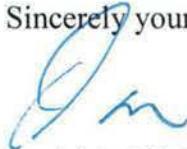
Attorneys at Law

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Our hope is that we can resolve all of these issues promptly and without further Board intervention. Until they are resolved, the discovery process cannot be completed, and, as the Board's decision affirms, until the discovery process is completed, the case cannot proceed.

Please let us know when you would like to meet and confer. Our hope is that we may use that opportunity to address all outstanding discovery issues.

Sincerely yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company and
Grand Trunk Western Railroad Company

cc: Theodore K. Kalick, Esquire

EXHIBIT 14

From: Rollins, Graham
Sent: Tuesday, September 30, 2014 3:11 PM
To: 'dhirsh@harkinscunningham.com'
Cc: 'Morgan, Linda J.'
Subject:

Good afternoon David,

For purposes of our meeting this afternoon, Amtrak proposes to search the documents of the following custodians for documents related to delay coding as outlined in the Board's order.

Al Walton (Director, Contract Operations)
Paul Vilter (AVP, Host Railroads)
Jim Blair (Senior Director, Host Railroads)
Jason Maga (Director, Host Railroads)
George Genge (Manager, Intermodal Services)

With respect to the other issues outlined in your letter:

1. Unproduced Attachments to Emails

We are evaluating the unproduced attachments in ATK005 and ATK006, including those you have identified in ATK005. We will follow up with you once we have completed our evaluation.

2. Ridership and Ticketing Revenue Database

We have compiled information related to the tables and fields from Amtrak's corporate data warehouse that contains ridership and ticketing revenue information. This is the source of the monthly reports that Amtrak has already produced. The table, field names, data types, and a description of each field is attached.

We will talk to you at 4pm.

Regards,

Graham Rollins

Morgan, Lewis & Bockius LLP

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EXHIBIT 15

From: David A. Hirsh/Harkins Cunningham/US
To: "Rollins, Graham" <grollins@morganlewis.com>, "Morgan, Linda J." <lmorgan@nossaman.com>
Cc: Simon A. Steel/Harkins Cunningham/US@HCNotes, Julie A. Waddell/Harkins Cunningham/US@HCNotes
Date: 10/06/2014 08:03 PM
Subject: Our Meet & Confer Tomorrow

Linda & Graham,

In order to make our meet and confer tomorrow as valuable as possible, I wanted to get back to you in advance on the two key issues on which we owe you a response.

A. CUSTODIANS

Pursuant to the Board's September 23 Decision, we believe that Amtrak should make some additional searches beyond the 5 custodians you list. As you know, Amtrak recently produced CN-related documents responsive to CN's RFP 14 and Interrogatory 17. While we have not had time yet to fully review those documents, our initial review provides cause to believe that merely searching the files of the 5 custodians you list will not suffice to capture relevant and responsive documents that relate to other hosts, or that are non-host-specific.

We therefore request that you expand your search in the following respects:

1. Please search and produce responsive documents from the files of custodians Rich Hyer, Tim Berg, Kelly Cunningham, and Morgan Connell.

The CN-related documents Amtrak has produced include various responsive documents from these custodians, including, for example, e-mails regarding delay coding classification, correction requests and disputes, spreadsheets regarding delay coding correction requests and their resolution and delay coding reconciliation, and notations relating to coding of train delays. Examples include:

R. Hyer, custodian: ATK 0000033607, 0000033610, 0000125884, 0000125906, 0000126036, 0000126210, 0000126290, 0000126430, 0000126905, 0000126955, 0000127126, 000127491.

T. Berg, custodian: ATK 0000033772, 0000181137.

K. Cunningham, custodian: ATK 0000032483.

M. Connell, custodian: ATK 0000033208.

We therefore believe that these individuals are likely to have comparable documents relating to other host railroads.

2. Please search for and produce responsive documents from the files of any additional Amtrak personnel who, during the pertinent time period (May 1, 2011 through Oct. 31, 2013): (a) had responsibilities respecting host carriers other than CN comparable to the responsibilities the custodians listed above (or in your email) had respecting CN, insofar as the responsibilities of the custodians listed above (or in your email) did not extend fully to such other host carriers; and/or (b) monitored CDR issues or communicated with Amtrak's Delay Input Offices or with host railroads on issues relating to delay coding.

Documents in Amtrak's current production suggest these functions are performed on both a host-railroad-specific and a region-specific basis. *See, e.g.*, ATK 0000031015 (agenda for meeting on CDRs), 0000031858 (discussing Division responsibilities and process for CDRs; each Division to designate one representative to deal with Delay Input Offices and with Host Railroads), 0000033699 (Field Supervisor guidelines relating to compliance or failure with TDRS, Conductor Delay Reporting), 0000126036 (R. Hyer document referencing "my respective host railroads" – implying that others have equivalent responsibilities for other host railroads), 0000127491 (email re CN OTP and CDR monitoring).

Please identify the individuals who fall within these functional capacities and confirm that you will search for and produce responsive documents from their files.

3. Please ensure that Amtrak's production will include the following specific responsive documents or information that are referenced, but do not appear to be included, in Amtrak's production thus far:

- (a) the "Policy and Procedures Manual (Railroad History, Arrow Procedures, background information on my respective host railroads etc)" and the "updated Host Railroad Issue Log" (insofar as these documents relate to issues involving delay codes) referenced in ATH 0000126036 (including all versions and iterations of them during the agreed 5/1/11-10/31/13 time period);
- (b) critiques of Amtrak Delay Reports (as referenced at ATK 0000030992); and
- (c) all notes or other documents related to the meeting referenced in ATK 0000031015 (agenda for meeting on CDRs) .

4. Finally, we've found several references to "TDRS" that suggest it may be a previously unidentified database or record management system containing relevant delay information, including with respect to failures to properly report delays. *See, e.g.*, ATK 0000031858 (all "[d]ocumentation in TDRS (under Code 632, 'Delay Reports') of any non-compliance with proper delay reporting procedures"); ATK 0000031015 ("Documentation of Conductor failures in TDRS"). Please explain to us what TDRS is and what it contains, so that we can discuss what production, if any, is required from TDRS; ATK 0000033699 (cited above).

B. RIDERSHIP AND REVENUES

Based on our review of the document you provided below describing Amtrak's database table and fields (referred to in that document as "F_TICKET_LIFT"), we ask that Amtrak produce the entirety of the database within our agreed upon date range (May 1, 2011 to October 31, 2013). Please provide the data on a hard drive. We assume the data can be produced as a CSV file. If so, please produce it in such a format. If not, let's discuss available formats.

We also have a follow up question. In the "Table Definition" of the document, it states that this data is "used to derive the other consolidated tables like Check Point, Train Stop, Daily Leg Ridership and True Origin and Destination fact tables." Is any information or data apart from the data included in F_TICKET_LIFT required in order to produce the referenced "consolidated tables?" If so, what more is required?

We look forward to a productive call tomorrow.

David

David A. Hirsh
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1700 K Street, N.W.
Suite 400
Washington, D.C. 20006-3804
dhirsh@harkinscunningham.com

Direct: 202.973.7606

EXHIBIT 16

REDACTED

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of December, 2014, caused a true copy of the foregoing
Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad
Company to Compel Responses to Discovery Requests to be served by e-mail upon:

Linda J. Morgan
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
lmorgan@nossaman.com

William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, DC 20002
herrmaw@amtrak.com



Spencer R. Leroux